SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 145

CARLOS MARCELLO,

Petitioner,

vs.

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF

This supplemental brief is submitted pursuant to the suggestion made to counsel during oral argument, by Mr. Justice Frankfurter. It relates solely to the removal of the Administrative Procedure Act exemption from the drafts of the Immigration and Nationality Act of 1952.

1. S. 3455. The first bill introduced in Congress was S. 3455 of the 81st Congress, 2d session, a bill sponsored by Senator McCarran on April 20, 1950. Section 242(b) of this bill had a specific exemption from the Administrative Procedure Act, as noted in our main brief, p. 16.

The exclusion provision of this bill (section 236) had a detailed code for the conduct of hearings for arriving aliens. The provisions were as follows:

SPECIAL INQUIRY OFFICERS

"SEC. 236 (a). Special inquiry officers shall be designated by the Commissioner or officer in charge at the various ports of arrival when necessary for the prompt determination of all cases of arriving aliens who are detained at such ports under the provisions of section 235 (b). Such special inquiry officers shall be selected from such officials of the Service as the Commissioner shall from time to time designate as qualified to serve in such capacity. One such officer shall have authority in any case to determine whether an arriving alien who has been held for inquiry under section 235 (b) shall be allowed to land or shall be deported, and such determination shall be made by such officer only after he shall have conducted an inquiry under oath in question and answer form. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Commissioner. A complete and permanent record of the proceedings, and of all testimony and evidence produced at such inquiry, shall be kept by the conducting officer.

(b) From a decision of a special inquiry officer adverse to the alien, such alien may take a timely appeal to the Commissioner, and any such alien shall be advised of his right to take such appeal. From a decision of the special inquiry officer to admit an alien, the officer in charge at the port where the inquiry is held may take a timely appeal to the Commissioner. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any

alien whose case is so appealed until the final decision of the Commissioner is made. Except as provided in section 235 (c), such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Except as provided in subsection (d), in every case where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Commissioner.

(d) Except as provided in section 213, the decision of a special inquiry officer when based upon the certificate of the examining medical officer, shall be final as to the rejection of an alien affected with tuberculosis in any form or with a loathsome or contagious disease, or with any mental or physical disability which would bring such alien within any of the classes excluded from admission to the United States under section 212."

In its comments on section 236 (on file in the Supreme Court Library) the Immigration Service noted that specific provision had been made in S. 3455 for the exemption of deportation proceedings from the Administrative Procedure Act but no specific exemption had been made in section 236, the exclusion provisions.

The Immigration Service therefore recommended that section 236 (a) be amended by adding the following language:

"Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237), the proceedings so established shall be the sole and exclusive procedure for determining the admissibility of a person to the United States."

2. S. 716 was introduced by Senator McCarran on January 29, 1951 (82d Congress, 1st Session) and H. R. 2379 was introduced by Congressman Walter on February 5, 1951 during the same session of Congress. In sections 236 (a) and 242 (b) these bills specifically refer to the Administrative Procedure Act.

In its comments on S. 716 (on file in the Supreme Court Library) the Immigration Service notes that specific provision is made both in the exclusion and the deportation sections for exemption from the requirements of the Administrative Procedure Act. In its comments on 236(a) the Immigration Service states "The last sentence of subsection (a) specifically provides that the Administrative Procedure Act shall not apply to proceedings for determining the admissibility of a person to the United States."

Commenting on section 242 (b), the Immigration Service states:

> ". . . This subsection specifically provides that the Administrative Procedure Act shall not apply to deportation proceedings."

It will be noted that in S. 716, and the companion bill H. R. 2379, Section 242(b) provided: "Notwithstanding any other law, including the Act of June 11, 1946, the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States."

Section 236(a) provided in both of these bills: "Notwithstanding any other law, including the Act of June 11, 1946, the proceedings so prescribed shall be the sole and exclusive procedure for determining the admissibility of a person to the United States."

3. Joint Hearings. Hearings were held on S. 716 and H. R. 2379 during March and April of 1951. These hearings are entitled *Joint Hearings Before The Subcommittees*

of the Committees on the Judiciary, 82d Congress, 1st Session, on S. 716, H. R. 2379 and H. R. 2816.

Various organizations objected to the elimination of the Administrative Procedure Act from immigration proceedings.

The position of the American Bar Association is set forth at page 537 as follows:

> "Accordingly we are opposed to so much of sections 242 and 236 of S. 716 insofar as those sections seek to exempt the Immigration Service from the provisions of the Administrative Procedure Act. The act was designed to bring impartial administrative justice to proceedings of Government agencies. We believe that its provisions should be extended rather than curtailed. We believe that compliance with the Administrative Procedure Act by the Immigration Service will improve the efficiency of the Service and respect for the enforcement of our immigration laws."

The American Civil Liberties Union testified as follows, (p. 144):

> "We believe that the provisions of the Administrative Procedure Act which had been applicable to deportation proceedings until eliminated by a rider to an appropriations act of 1950 (Public Law 843, 81st Cong. 2d sess.), should be made applicable again. Every measure to preserve and insure a fair, complete, and unbiased hearing should be provided because of the overwhelming importance which an immigration or naturalization proceeding has in the life of any person."

The representative of the Americans for Democratic Action testified as follows (p. 446):

"The Administrative Procedure Act of 1946 should again be made applicable to deportation proceedings, since the prime consideration is the granting to the aliens involved of a fair, full and unprejudiced hearing."

The representative of the Association of Immigration and Nationality Lawyers testified as follows at p. 690:

"Mr. Lazarus. Mr. Chairman, I think the Administrative Procedure Act which, as you know, is the result of many, many years of investigation and study, should apply to the Immigration and Naturalization Service as it does to the many other Government agencies which do administer our laws.

"Mr. Arens. You mean in both exclusion and in deportation proceedings?

"Mr. Lazarus. I think it should embrace both. It should embrace both, because serious rights are often involved in exclusion cases, the very serious right of citizenship is challenged very often in a board of special inquiry hearing."

The representative of the National Catholic Rural Life Conference advised Congressman Walter by letter as follows, (p. 739):

"There is considerable concern in circles interested in immigration and naturalization over the possible undesirable effects of suspending the Administrative Procedures Act as it affects aliens."

4. The revised bills. Thereafter, in the 82d Congress S. 2055 and S. 2550 were introduced by Senator McCarran and H. R. 5678 was introduced by Congressman Walter. These final drafts eliminated the language "notwithstanding any other laws, including the Act of June 11, 1946 (60

Stat. 237)" from the proposed law from sections 236(a) and 242(b). As finally enacted this specific repeal of the Administrative Procedure Act was completely eliminated.

Respectfully submitted,

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